

1 you mean by that is that if in the context of putting
2 an attachment on, if something happens, that there's
3 a glitch or something in the process that causes say
4 the power line to shut down, that that's the kind of
5 risk of loss you're talking about?

6 THE WITNESS: I mean that may fall under
7 this category, but what I was initially thinking when
8 I wrote that and made that reference was the fact that
9 if a car slams into a pole, it is the obligation and
10 responsibility of the pole owner to go out and set a
11 new pole.

12 JUDGE SIPPEL: Uh-huh. All right. So
13 there's the risk of loss associated with that?

14 THE WITNESS: Yes, sir. The general risk
15 of ownership and the risk of loss associated with
16 owning a series of poles.

17 JUDGE SIPPEL: Okay. So I mean there's
18 nothing special, nothing specially unique to being a
19 power company in connection with that loss; it's just
20 anybody who's an owner has a risk of loss.

21 THE WITNESS: Yes, sir.

22 JUDGE SIPPEL: Okay.

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1 MR. COOK: Your Honor.

2 BY MR. COOK:

3 Q In your testimony you compare equipment
4 sales to pole attachments noting that in equipment
5 sales the risk of loss transfers to the buyer; right?

6 A Often is the case.

7 Q Now, of course, one difference between an
8 equipment sale and a pole attachment is that the power
9 companies continue to use their poles even when others
10 are attached; right?

11 A That's true, the power company does
12 continue to use their poles, yes.

13 Q Now another thing you say is a component
14 of this value of the elevated corridor is that the
15 power company maintains its poles at certain levels;
16 is that right?

17 A I understand that to be true, yes.

18 Q But you agree that a utility has to
19 maintain its poles at the standard set by, for
20 example, in this case the Florida Public Service
21 Commission for its own operations; right?

22 A I understand that's true, yes.

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1 Q Okay. Another thing you say in your
2 testimony, about pages 15 to 16, is that cable
3 companies cherry-pick attachments; right?

4 A Yes.

5 Q And you haven't attempted to quantify any
6 value to cable companies from being able to attach to
7 particular Gulf poles, though, have you?

8 A I have not.

9 Q Okay. And I believe you have agreed you
10 are not familiar with cable television franchise
11 agreements with municipalities; right?

12 A I hate to say that I'm not familiar with
13 them, but I have a familiarity with that topic.

14 Q Okay. Is it accurate to say you don't
15 know whether local franchising authorities impose
16 requirements that after a certain population density
17 is met, holders of cable franchises must serve anyone
18 who requests service?

19 A I understand that the aspects of contracts
20 and franchise agreements can vary among jurisdictions,
21 and that is certainly, you know, a plausible
22 requirement that could be included.

1 Q Okay. And then coming to the overall
2 value of the elevated corridor, I believe you said you
3 haven't attempted to calculate the overall value of
4 the elevated corridor; right?

5 A I'm -- I'm confused by that question. Can
6 you repeat that?

7 Q Sure. You haven't -- we talked earlier
8 about components and calculating and quantifying
9 components of this elevated corridor of which you
10 speak, and I wanted to understand, you haven't
11 attempted to calculate, when you add up all the
12 components, the overall value of the elevated
13 corridor, have you?

14 A Again, I have not prepared a separate
15 calculation. I reviewed Gulf Power's calculation, so
16 I hope that addresses your question.

17 Q Okay.

18 JUDGE SIPPEL: Well, is it a calculation
19 that you reviewed that in your opinion constitutes an
20 overall value of an elevated corridor?

21 THE WITNESS: On a pole-by-pole basis per
22 attachment basis, I think that's true.

1 JUDGE SIPPEL: Well, how strong is your
2 belief, your thinking that it's true?

3 THE WITNESS: That's my understanding of
4 that. That's what that calculation represents to me.

5 JUDGE SIPPEL: And did you do anything to
6 independently determine that it was as represented, or
7 did you just take it at face value?

8 THE WITNESS: I analyzed it and thought
9 about the methodology employed by Gulf Power and
10 applied it to my own expertise and training and found
11 it to be a good representation of the value on a per-
12 pole basis of the elevated communication corridor.

13 JUDGE SIPPEL: Okay. On a per-pole basis.
14 Okay. Mr. Cook, you want to take it from
15 there?

16 MR. COOK: Yes, Your Honor.

17 BY MR. COOK:

18 Q I would like to move into the specific
19 valuation methodologies that you looked at in the
20 pursuit of coming up with a fair market value for
21 Gulf's pole space.

22 The first valuation method that you looked

1 at as a possible way of determining fair market value
2 was the sales comparison method; right?

3 A Correct.

4 Q And as to this method, when you wrote your
5 expert report, I believe you looked at only one
6 document; right? A one-page document provided by Gulf
7 Power listing what parties other than the four --
8 well, actually listing what parties to Gulf Power's
9 pole attachments pay to Gulf Power as pole attachment
10 rates; right?

11 A You know, I've begun research, and I don't
12 know that I had -- I don't know what information I
13 received prior to my deposition, so I apologize if I
14 don't get the timing right, but I think that at that
15 point that was the only document that I reviewed.

16 Q Okay.

17 MR. COOK: Could I have drawn up on the
18 screen the Gulf Power Exhibit 60 that's been admitted
19 into evidence.

20 BY MR. COOK:

21 Q Mr. Spain, up on the screen is Gulf Power
22 Exhibit 60. It's a one-page document that says Semi-

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1 Annual Cable TV Billing for the Period January 1st,
2 2006 to June 30th, 2006. Is this the one-page
3 document of which you spoke?

4 A I think it is.

5 Q Okay. Now I note that this document shows
6 about a dozen attachers paying around \$7 or less for
7 an annual pole attachment rate; is that right?

8 JUDGE SIPPEL: Can you see that?

9 THE WITNESS: May I step down?

10 JUDGE SIPPEL: Either get him a copy or
11 let him step down. You can step down if you wish.

12 THE WITNESS: I'm sorry, yeah, it's hard
13 to read. I might need to see a paper copy.

14 JUDGE SIPPEL: Let's put it in front of
15 him.

16 You'll have to excuse me, Mr. Spain. I'm
17 just mesmerized with this technology. I have seen
18 that, too. I think you're going to have to look at it
19 overall to get some -- thanks very much. I've got my
20 copy, too.

21 MR. COOK: Thank you.

22 BY MR. COOK:

1 Q I note that this document, Gulf Power
2 Exhibit 60, shows about a dozen attachers paying
3 around \$7 or less for an annual pole attachment rate;
4 is that right?

5 A That looks to be about right.

6 Q And it shows several attachers, somewhere
7 around eight, paying a rate of \$40.60; right?

8 A That looks to be right.

9 Q Now, by the way, you don't know of any
10 connection between the \$40.60 rate and the
11 availability of pole space on those particular poles
12 containing those eight attachers, do you?

13 A I do not.

14 Q Okay. Five of the eight attachers paying
15 \$40.60 are on 14 or fewer poles; is that right?

16 A Unless I'm looking wrong, I see two
17 attachers at 40.60 paying -- paying 40.60 on 14 or
18 fewer poles. Did I look wrong?

19 Q And could I direct your attention to the
20 bottom three lines, lines 17, 18, and 19 --

21 A Uh-huh.

22 Q -- if I'm right.

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1 A Yes.

2 Q Are those attachers on 3, 9, and 2?

3 A That's correct.

4 Q Or numbers of attachments?

5 A Uh-huh.

6 Q The other three attachers that are paying
7 \$40.60, Southern Light, Adelphia Business Solutions,
8 and KMC Telecom II, have about 1500, 900, and 200
9 attachments approximately; is that right?

10 A Southern Light, roughly 1500; Adelphia,
11 200; and KMC, 880, roughly. Is that what you said?
12 Okay.

13 Q Right. Now in your expert report you
14 termed these attachers as paying unregulated
15 attachment rates; right?

16 A That's what I understand.

17 Q Okay. Now these three attachers, Southern
18 Light, Adelphia Business Solutions, and KMC Telecom
19 II, they are licensed competitive local exchange
20 carriers, aren't they?

21 A I think that's right, yes.

22 Q Okay. And if they are licensed

1 competitive local exchange carriers, they would, if
2 they wanted to press the issue, they would qualify for
3 rates under the FCC telecom formula; right?

4 MR. ESTES: Objection, Your Honor. It's
5 calling for this witness to testify about what other
6 people would do.

7 JUDGE SIPPEL: And you're using this an
8 illustration of the general industry or about these
9 particular companies?

10 MR. COOK: Well, this -- what I'm using
11 this for is they say that there's a market for --

12 JUDGE SIPPEL: All right. Never mind.
13 That's okay. That's okay. I'm going to overrule the
14 objection.

15 Go ahead. Can you answer that question?

16 THE WITNESS: I need it repeated. I'm
17 sorry.

18 JUDGE SIPPEL: Go ahead.

19 BY MR. COOK:

20 Q If these in fact are telecom carriers, do
21 you have any understanding could they invoke the FCC
22 pole attachment telecom rate?

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1 A I, you know, don't practice law in that
2 area, but I understand that they could.

3 Q Okay. You are not aware of any effort by
4 those three attachers to contest or challenge Gulf's
5 ability to charge the \$40.60 rate, are you?

6 A As I understand it, there were
7 negotiations that resulted in this rate.

8 Q Okay. But you're not aware of any effort
9 to challenge that \$40.60 rate, are you?

10 A I'm not aware of any.

11 Q Okay.

12 MR. COOK: I'd like to turn to a different
13 document, Your Honor. This is Complainant's Exhibit
14 77. This would be in Volume 3 of complainant's
15 exhibits. It's Volume 3, Your Honor.

16 JUDGE SIPPEL: Exhibit 17, Mr. Cook?

17 MR. COOK: Exhibit 77.

18 JUDGE SIPPEL: Thank you.

19 MR. COOK: Page 1.

20 BY MR. COOK:

21 Q Mr. Spain, I want to draw your attention
22 to paragraph 2 of Complainant's Exhibit 77, where

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1 Adelphia Business Solutions writes that ABS is not in
2 a position to engage in an arm's length negotiation --
3 it just says Gulf Power, with Gulf Power -- Gulf Power
4 as pole owner effectively holds all the leverage
5 through its ability to withhold authorization to
6 attach, and thereby prevent or delay our ability to
7 construct our network unless we consent to the terms
8 and conditions deemed acceptable by Gulf Power.

9 My question is, you wrote your report in
10 this case without ever seeing any document like this;
11 right?

12 JUDGE SIPPEL: Get the document on the
13 document.

14 MR. COOK: Sure. That should be on the
15 top.

16 JUDGE SIPPEL: Well, let's get it for the
17 record. This is dated --

18 MR. COOK: October 4th, 1999.

19 JUDGE SIPPEL: Thank you. And it's
20 addressed to Mr. Dunn.

21 MR. COOK: That's right.

22 JUDGE SIPPEL: We know who he is. He

1 testified here.

2 MR. COOK: Right.

3 JUDGE SIPPEL: All right.

4 BY MR. COOK:

5 Q And the question is, you haven't ever seen
6 a document like this where an attacher complains about
7 Gulf Power's ability to withhold authorization to
8 attach and having all the leverage, have you?

9 A I have not seen this document, and I don't
10 recall seeing others like that. Anything like that.

11 Q Okay.

12 A However, the basis for my comments largely
13 relating to market are -- and most of my research to
14 this point has been in the area of the cooperative and
15 the muni worlds.

16 Q Okay. Which you have agreed are not
17 covered by section 224; right?

18 A That's correct.

19 Q Okay.

20 JUDGE SIPPEL: And by that, you mean
21 municipal --

22 THE WITNESS: Municipally owned electric

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1 systems.

2 JUDGE SIPPEL: Thank you.

3 THE WITNESS: I'm sorry.

4 JUDGE SIPPEL: That's all right.

5 BY MR. COOK:

6 Q Now I believe it's accurate to say in this
7 case for your work, you did not talk to any cable TV
8 or telecom attachers; right?

9 A In connection with this engagement, that's
10 true.

11 Q Okay. And in addition to looking at the
12 one-page document on pole attachment rates, which was
13 Gulf Power's Exhibit 60, your work on the sales
14 comparison method involved making a few telephone
15 calls to people you knew at electric cooperatives;
16 right?

17 A That was a component of it. I made
18 telephone calls to those I knew within the industry,
19 particularly in the cooperative and the municipally
20 owned realms of this industry, and I spoke with
21 another consultant as well regarding this issue.

22 Q Okay. So if you are comparing pole

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1 attachment rates paid by attachers to co-ops who are
2 unregulated -- you just said under -- not included
3 under 224 -- to rates paid by cable attachers in this
4 case, you would be comparing unregulated rates to
5 regulated rates; right?

6 A Yeah, I think that's true. I'm comparing
7 unregulated rates to regulated rates.

8 Q Okay. And the -- let's see if I can get
9 this pronunciation right. The Choctawhatchee
10 agreements that are discussed in your testimony are
11 agreements between the cable operators and an electric
12 cooperative that's not subject to section 224; right?

13 A I understand that -- right, that many
14 people say CHELCO, which is Choctawhatchee Electric
15 Cooperative -- that's easier -- is not subject to 224.

16 Q Okay. And then in your look at the sales
17 comparison method, you looked to see if you could find
18 any examples of utility plant transactions that might
19 be applicable, but you couldn't find any; right?

20 A That's correct.

21 Q Okay. And in the end, in your report on
22 page 5, you concluded that there was a "primary

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1 difficulty" with applying the sales comparison method
2 to valuing utility poles because there is a "lack of
3 comparable transactions involving distribution plant
4 sales." Is that right?

5 A Regarding the value of the poles
6 themselves was the reference I was making there.

7 Q Okay. In looking at -- a couple of last
8 questions on the sales comparison method. In looking
9 at that method, you didn't look at Gulf's joint use
10 pole attachments with BellSouth, Spring, or GTC?

11 A I did not look at those agreements.

12 Q Okay. And you don't know, therefore, what
13 monies the ILECs like BellSouth paid to Gulf Power, do
14 you?

15 A No, I don't know what monies that the
16 ILECs paid, but of course I do know that the
17 relationship between the ILECs and the power companies
18 grew out of different circumstances, of course, than
19 did the relationship between pole owners and cable
20 attachers.

21 Q Okay. And you never calculated a per-foot
22 attachment cost for Gulf's ILEC attachers; right?

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1 A I have not made a separate calculation,
2 no.

3 Q Okay. Now moving away from the sales
4 comparison method to a different method that we've
5 heard a little bit about in this case, and I just want
6 to check to see if you have heard anything about it,
7 one valuation method that has been mentioned by Gulf
8 Power in this case is something called the Federal
9 concessions leasing method. But you have not done any
10 analysis under this Federal concessions leasing
11 method, have you?

12 A I have not done a separate analysis under
13 that and I don't think that at this point, to my
14 information, the information is available to prepare
15 that calculation at this time either.

16 Q Now I would like to move to a third method
17 called the income method of valuation. I believe this
18 method you referred to briefly in your report around
19 page 5 as the income approach; is that right?

20 A Correct.

21 Q But you stated in your report that one
22 would encounter difficulties trying to determine what

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1 portion of a power company's total income or cash
2 flows are attributable to a piece of a utility system;
3 right?

4 A That's correct.

5 Q And you concluded that because of these
6 difficulties, the income approach generally is
7 impractical as an approach to valuing an electric
8 company's poles and the space on those poles; right?

9 A That's correct.

10 Q Okay. Now I would like to move to the
11 last method that you looked at, replacement cost
12 method. This is a method that I believe you do
13 recommend or endorse in your report as a way of
14 valuing Gulf's poles; is that right?

15 A Correct.

16 Q Okay. And this is the same method that
17 Ms. Davis used in her three-page calculation that you
18 received near the start of your work; right?

19 A That's correct.

20 Q Okay.

21 JUDGE SIPPEL: That was at Gulf Power 52;
22 is that right?

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1 MR. COOK: That's right.

2 JUDGE SIPPEL: That you're referring to?

3 MR. COOK: Exactly. The earlier version
4 of the three pages.

5 JUDGE SIPPEL: Thank you.

6 BY MR. COOK:

7 Q Now when Ms. Davis takes the average, for
8 example, of new poles acquired in a certain year to
9 get a replacement cost of a new pole, those poles are
10 not necessarily poles that the four cable operators in
11 this case are actually attached to; right?

12 A That calculation, that average contains
13 poles added, as I understand it, during the most
14 recent year, and therefore it is likely, if not even
15 probable, that the complainants are attached to some
16 of those poles.

17 Q But you don't know whether the cable
18 operator attachments are attached to the new poles
19 that are used to calculate the average for replacement
20 cost; right?

21 A I have not specifically identified the
22 poles in that calculation and the poles to which

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1 complainants are attached and tried to match those
2 two.

3 Q No one at Gulf has told you complainants
4 are attached to the new poles that are used in
5 calculating the average, though; right?

6 A No one has made that specific
7 representation, but again I want to be sure I'm clear
8 that I understand that average to be all poles added
9 in the last year and therefore it is likely and
10 probable that the complainants are attached to some of
11 those poles.

12 Q But you don't know that for sure?

13 A That's why I say it's likely and probable.

14 Q Okay. Now to your knowledge, Gulf wants
15 to apply its replacement cost rate to every pole on
16 which the cable operators are attached; right?

17 A I believe that's correct.

18 Q And you have testified that even when an
19 attacher pays for a pole changeout in full -- in other
20 words, pays to replace a specific pole -- he should
21 continue, if he's a cable operator under this method
22 of replacement cost, to pay an annual pole attachment

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1 rent at a replacement cost rate on the new pole;
2 right?

3 A That is what I think is appropriate and
4 that's -- I cite a couple of reasons for that, and
5 they include the facts that the power company has to
6 maintain that pole and that the power company must
7 also replace that pole in the event of failure, and
8 therefore the cable attacher has not assumed any
9 additional risk for going on -- on a going-forward
10 basis.

11 Q In fact, one reason that you mention for
12 why a cable attacher may have paid to replace a
13 specific pole should also be charged, in your view, a
14 replacement cost rate for that attachment is that "the
15 attacher will continue to benefit from the existence
16 of the pole in the network," the distribution network;
17 right?

18 A Yeah, that's true.

19 Q Okay. And it is your testimony that --
20 well, I'm sorry, you agree that Ms. Davis's
21 replacement cost calculations serve as a reasonable
22 proxy for calculating the value of the entire

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1 networkwide elevated corridor; right?

2 A Right. Again on a pole-by-pole basis,
3 yes, that's true.

4 Q Okay. Now among the elements of value --
5 and I believe you might have referred to this in your
6 answer a moment ago -- that you say is provided to
7 attachers that's reflected in replacement costs are
8 things such as the electric utilities' right-of-way
9 procurement and even its engineering to design a
10 system of electric poles; right?

11 A Those are elements required in order to
12 construct a distribution system.

13 Q Okay. Now I understand that in
14 recommending the replacement cost approach to reaching
15 a fair market value, you take the position that it is
16 not appropriate to incorporate a component for
17 depreciation; is that right?

18 A That's true, and that's based on what I
19 mentioned a moment ago which is the risk of loss issue
20 and the risk of ownership issue, and the fact that an
21 attacher does not assume any risk associated with
22 failure or maintenance or an obligation to replace.

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1 And therefore -- I'm sorry. And therefore that
2 renders to the attacher all poles as functionally new,
3 and I point out also that in each of the four
4 depositions of the complainants' representatives, they
5 testified that all poles are in fact as they see it
6 either functionally new or they don't care what the
7 age of a pole is.

8 Q And that was my next question. Your
9 reasoning for not incorporating depreciation is that
10 the attacher gets the benefit of attaching to a pole
11 that's "functionally new," right?

12 A That's correct.

13 Q Now in general, apart from the specific
14 context of pole attachments, the replacement cost
15 approach or methodology to valuation usually
16 incorporates depreciation, does it not?

17 A That's customary and most common, yes.
18 And in this case I think that was inappropriate for
19 the reasons I just mentioned.

20 Q Now, of course, wood poles actually have
21 useful lives, don't they?

22 A They do.

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1 Q Okay. And you agree that Gulf considers
2 the useful life of a standard wood distribution pole
3 to be 17 years; right?

4 A Approximately. Again, I'm sorry, but I
5 don't know the exact age estimate, but I understand
6 it's in the 17 to 20 range, yes.

7 Q And you agree that that's your
8 understanding based on Gulf's depreciation rate that
9 it uses in treating its poles; right?

10 A That's correct.

11 Q Okay. And you don't have any personal
12 knowledge about how often Gulf Power replaces its
13 utility poles; right?

14 A I do not.

15 Q Okay. And if depreciation were
16 incorporated into Gulf Power's replacement cost
17 calculations, you don't know how much that would
18 reduce Gulf Power's claimed replacement cost rates, do
19 you?

20 A I have not made that calculation, so, no,
21 I don't know.

22 Q Okay. You are not aware that when Gulf

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1 Power previously argued to the enforcement bureau for
2 replacement costs that they hired an appraiser named
3 Henry Wise, are you?

4 A I think you mentioned his name to me in
5 deposition, if I recall, and so I'm aware that there
6 was a person with that name involved in some manner
7 previously.

8 Q Is it fair to say that was the first time
9 you heard of Mr. Henry Wise, at your deposition?

10 A That's true.

11 Q Okay. So you are not aware that when Mr.
12 Wise filed an affidavit in this case in the year 2000,
13 he used something called a depreciated replacement
14 cost approach, are you?

15 A I'm not aware of his calculation.

16 Q Okay.

17 A Or methodology.

18 Q And you are not aware that the commission,
19 in ruling on a parallel proceeding with Alabama Power
20 in May 2001, in paragraph 34 of its order specifically
21 rejected the previous version of the replacement cost
22 approach advocated by Gulf Power, are you?

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